85-1305

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985
No. _____

B.J. BUNNELL, Superintendent
California Correctional
Institution,

Petitioner,

v.

JEROME M. ARMANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether a Circuit Court of Appeals may disregard a United States District Court's factual findings, supported by the state record, that a state defendant did not make an unequivocal demand for self-representation.

II

Whether a state defendant's demand for self-representation in conjunction with a request for a substantial continuance, made for the first time on the date set for trial, is presumptively untimely as being disruptive to the orderly trial process and thus properly denied.

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INTRODUCTION

Petitioner, Joe Marquez, respectfully urges that this Honorable Court grant this Petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals for the Ninth Circuit, filed September 24, 1985, reversing the judgment of the United States District Court for the Central District of California after that Court denied respondent's petition for writ of habeas corpus.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief appears as Appendix A to this petition and is published in 772 F.2d 552. A copy of the Ninth Circuit's order denying the petition for rehearing and rejecting the suggestion for rehearing en banc appears as Appendix B. The judgment of the United States District Court and its findings denying habeas corpus relief appears as Appendix C.

Opinions arising out of state proceedings are as follows: The California Court of Appeal opinion, dated May 27, 1982 appears as Appendix D. The

order of the California Supreme Court denying the petition for hearing from the foregoing opinion appears as Appendix E.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed on September 24, 1985. (Appendix A.) On November 19, 1985, an order was filed denying the petition for rehearing and rejecting the petition for rehearing en banc. (Appendix B.) The period pending the petition for rehearing tolled the period in which the petition for certiorari must be filed. (Department of Banking v. Pink (1942) 317 U.S. 264, 266; Gypsy Oil Company v. Escoe (1927) 275 U.S. 498.) Thus this petition is being filed timely. (28 U.S.C. 2101(c).)

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

RULE OF COURT INVOLVED

The pertinent portion of Rule 52, Federal Rules of Civil Procedure reads as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous . . . ."

STATEMENT OF THE CASE

A. Summary of Proceedings Below

In an information filed by the District Attorney of Los Angeles County, respondent was charged with arson in violation of section 451(d) of the California Penal Code. Respondent pleaded not guilty. (C.T. pp. 1-2.)[1/]

A jury found respondent guilty as charged. (C.T. pp. 42-43.) Respondent was sentenced to state prison for two years. (C.T. p. 49.)

The California Court of Appeal affirmed the judgment. That Court held that the trial court properly denied

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1. C.T. refers to the Clerk's Transcript on respondent's state appeal.

respondent's untimely request for self-representation because a state defendant, who seeks a continuance to represent himself, "must make an unequivocal assertion of that right within a 'reasonable time' prior to the commencement of trial." (Appendix D.) Respondent then filed a petition for hearing, now denominated as a petition for review, in the California Supreme Court. Respondent again contended that he was unlawfully denied the right to self-representation. The California Supreme Court denied the petition. (Appendix E.)

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. In the petition, respondent

asserted that his right to self-representation was improperly denied. The United States District Court found that respondent did not make an unequivocal demand for self-representation and thus denied the petition for writ of habeas corpus. (Appendix C.)

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. Respondent again pressed the self-representation contention in the brief on appeal. The United States Court of Appeals, in reversing the District Court's judgment, totally disregarded the findings of fact of the District Court on self-representation as set forth above. The Ninth Circuit assumed the demand for self-representation was unequivocal. Furthermore, the Court held that

because the demand for self-representation was made prior to the selection of the jury, it was presumed to be timely as a matter of law. The Court placed the burden on the People to overcome that new presumption by showing that the demand for self-representation "was a tactic to secure delay." (Appendix A, pp. 60-62.) The Court also held that the state trial court abused its discretion in denying respondent's request for a three week continuance. The thrust of the Court's ruling was that, even though respondent did not request self-representation at his first opportunity to do so, he demonstrated sufficient diligence when he exercised his option to request it two weeks later, on the eve of trial. The Court also summarily concluded that

respondent suffered prejudice by the trial court's failure to grant his request for a continuance and that to grant a three weeks continuance would not have "created grave scheduling difficulties" for the trial court. (Appendix A, pp. 63-69.) One judge dissented in part on the grounds that the People should have had the opportunity for an evidentiary hearing in the District Court on the issue of whether respondent sought self-representation to secure delay of the trial proceedings. (Appendix A, pp. 74-80.)

Petitioner filed a petition for rehearing and suggestion for rehearing en banc in the Court of Appeals. Petitioner strongly urged that the finding of the United States District Court that respondent did not make an unequivocal

demand for self-representation found full support in the state trial record and was therefore binding in the ninth circuit. Petitioner also argued that respondent did not assert the right to self-representation timely and that it was improper to place the burden of this issue on the People. The United States Court of Appeals summarily denied petitioner's petition. (Appendix B.)

B. The Pertinent Factual Background

The information accusing respondent with arson was filed on February 11, 1981. (C.T. p. 1.) On the same date counsel was appointed to represent respondent. At arraignment, respondent pleaded not guilty. (C.T. p. 2.) Then on February

18, 1981, in addition to respondent's request for release on his own recognizance, the following pertinent proceedings transpired in the trial court:

"MR. CLARK: Michael Clark, Deputy Public Defender, on behalf of Mr. Armant.

"First, Your Honor, Mr. Armant indicated to me that he wanted to be appointed co-counsel in this case.

"I informed Mr. Armant that the Public Defender's position is that we are not co-counsel for the clients; that Mr. Armant wanted to represent himself.

"He has a constitutional right to do that. But that the

Public Defender would not be appointed in a co-counsel status in this case.

"THE COURT: Well, the court so orders." (Aug. R.T. p. 1, lines 13-23.)[2/]

During the February 18, 1981 proceedings respondent did not request an opportunity to represent himself. Instead, as shown above, respondent through counsel, only requested permission to be "appointed co-counsel."

On March 30, 1981, the date set for trial (C.T. p. 3.), respondent requested permission to represent himself.

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2. Aug. R.T. refers to the Augmented Reporter's Transcript on respondent's state appeal.

Respondent indicated that he was dissatisfied with counsel because counsel did not make various motions which respondent deemed advisable. (Aug. R.T. pp. 5-8.) Respondent stated that he was not prepared to proceed with the trial proceedings and would require a continuance for three weeks. Respondent did not give any reason for the need for a continuance. (Aug. R.T. p. 8.) The trial court made the following ruling:

> "THE COURT" Well, the request of the defendant for a continuance to the day of trial to represent himself in pro per is denied. It 's not a timely-made request. I'm not going to continue this matter for

three weeks." (Aug. R.T. pp. 8-9.)

On the following day, March 31, 1981, the date the trial commenced, respondent made the following pertinent request in open court:

"THE DEFENDANT: For the record your Honor, on the 18th of March I was prepared to have Mr. Clark dismissed from my case in order so I may hire my own attorney for my day in court, which was March the 18th. It was postponed until March the 30th.

"I was rushed out by the bailiff before I could ask Mr. Clark -- before I could ask Mr. Clark to be dismissed. I am asking the

court today for the same request, which [sic] the same request, was made March 30th and denied. I will request from 14 to 21 court days so I may hire an attorney of my own choosing. I would thank the court very much for your consideration." (R.T. pp. 2-3.)[3/]

Respondent continued to insist that he was being denied the right to have an attorney of his own choosing. The court determined that respondent was receiving competent representation and thus it denied respondent's motion. (R.T. pp. 3-4.)

As indicated in the summary of the proceedings, the state reviewing court, as

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3. R.T. refers to the Reporter's Transcript on respondent's state appeal.

well as the United States District Court, agreed with petitioner's position that respondent was not unconstitutionally denied the right to represent himself. On the other hand, as also shown in the summary of proceedings, supra, the Ninth Circuit Court of Appeals disregarded the findings of the United States District Court that respondent did not make an unequivocal demand to represent himself even though the state record amply supports the District Court's findings.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT, WITH NUMEROUS DECISIONS OF THE COURTS OF APPEALS, AND ALSO WITH RULES OF COURT WHICH MANDATE THE FINDINGS OF THE UNITED STATES DISTRICT COURT ARE BINDING IN THE COURTS OF APPEALS

As shown in the Statement of the Case, supra, the District Court made factual findings that respondent did not make an unequivocal demand for

self-representation. Specifically, the District Court made the following findings:

> "Moreover, it is not clear that petitioner's ultimate desire was to proceed pro se. Where it cannot be concluded that a defendant's demand to proceed pro se was unequivocal, no denial of the right to self-representation has occurred. (Citation omitted.) Petitioner variously requested to be appointed co-counsel (on two occasions), to represent himself, to have new counsel appointed, and finally, to have his own retained counsel (which he now admits was not financially feasible. . . .)

Thus, his unequivocal demands did not entitle him to proceed pro se." (Appendix C, pp. 97-98.)

The findings that respondent did not make an unequivocal demand to represent himself find abundant support in the state record. As shown in the Statement of the Case, on February 18, 1981, respondent merely requested permission to act as co-counsel. Then on March 30, 1981, respondent appeared to make a request to represent himself, but on March 31, 1981 he clarified his request to indicate that he desired a continuance to obtain other counsel. Thus the findings of the District Court that respondent did not make an unequivocal demand for self-representation have a strong foundation in the trial record.

Nonetheless, the Ninth Circuit totally ignored the District Court's findings of fact, and, instead, simply failed to consider them. (Appendix A.)

It is settled that, under Rule 52 of the Federal Rules of Civil Procedure, the findings of fact by the District Court are binding upon the reviewing courts unless those findings are clearly erroneous, i.e., unless the record does not support them. (Anderson v. Bessemer City (1985) 470 U.S. ____, 84 L.Ed.2d 518, 528, observing that the clear and erroneous test applies not only to testimony, but also to documentary evidence. (See also, McAllister v. United States (1954) 348 U.S. 19, 20; Felder v. United States (9th Cir. 1976) 543 F.2d 657, 663; Hicks v. Town of Hudson (10th Cir. 1967)

390 F.2d 84, 87; Pennington v. Colonial Pipeline Company (5th Cir. 1968) 387 F.2d 903, 904.)

The finding that respondent failed to make an unequivocal demand for self-representation is clearly a factual finding. This Court's decisions in similar cases permit no other conclusion. For instance in Maggio v. Fulford (1983) 464 U.S. 111, 117 this Court held that the finding that the accused was competent to stand trial was a factual finding. By contrast in Miller v. Fenton (Dec. 3, 1985) ___ U.S. ___, 54 LW 4022, this Court clarified the definition of a factual finding. This Court ruled that the ultimate finding that a confession is voluntary is not a factual finding. However, the Court held that all findings

which necessarily enter the ultimate determination of whether the confession was given voluntarily are factual findings binding in federal habeas corpus proceeding if fairly supported by the record. The Court observed that the ultimate finding of voluntariness does not require a determination of the credibility or demeanor of witnesses.

In the instant case, the finding that respondent did not make an unequivocal demand for self-representation was one adjudging respondent's credibility as to his alleged desire to represent himself. Respondent first sought to act as co-counsel and then ostensibly requested permission to represent himself, but later stated that he actually desired a continuance to obtain other counsel.

Obviously respondent's credibility on the issue of whether he was, in reality, requesting self-representation was gravely in doubt and such credibility and the determination of respondent's intent from his conflicting requests were clearly factual matters for the determination of the District Court. The foregoing decisions did not involve an ultimate legal conclusion but rather factual findings necessary for a determination of the legal conclusion -- whether the state defendant was deprived of his right to represent himself. Thus petitioner strongly urges that the above finding of the District Court that respondent did not make an unequivocal demand to represent himself was binding in the Ninth Circuit proceedings.

As Faretta v. California (1975) 422 U.S. 806, 835 itself declared, to warrant self-representation the record must show that the defendant "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." Respondent having failed to even come close to meeting this burden, the only logical legal conclusion that can follow under Faretta is that respondent was not denied any constitutional right to represent himself.

II

THE DECISION BELOW, THAT A DEMAND FOR SELF-REPRESENTATION MADE ON THE DATE SET FOR TRIAL IS TIMELY UNLESS THE PEOPLE CAN SHOW THAT IT WAS MADE SOLELY FOR THE PURPOSE OF DELAYING THE TRIAL PROCEEDINGS, IS IN CONFLICT WITH FARETTA AND STATE COURT DECISIONS.

The Ninth Circuit Court of Appeals held in the instant case that a request for self-representation made on the eve of trial but before impaneling of the jury is timely as a matter of law, unless it was a tactic to secure delay. The Court also made it explicit that the record must show that the request was made to secure a

delay of trial proceedings or it will be deemed timely. (Appendix A, p. 9.)

The foregoing conclusion of the Ninth Circuit Court of Appeals is in total conflict with this Court's holding in Faretta. In Faretta, this Court stated that a defendant is entitled to self-representation if he makes an unequivocal demand for self-representation several weeks prior to trial after having waived his right to counsel. Thus, to be entitled to self-representation, the defendant must make an unequivocal demand for self-representation and that demand must be made a considerable period prior to trial. (Faretta v. California, supra, 422 U.S. at p. 835.) Moreover, the Faretta decision also instructed that a defendant who engages in obstructionist conduct may

have his right to self-representation terminated and that a pro per defendant has no right to abuse the dignity of the courtroom. (Id. 422 U.S. at p. 834, fn. 46.) Petitioner submits that a defendant who requests permission to represent himself, on the eve of trial, especially where he requests a three week continuance, has not made a timely request for self-representation. In fact for the reasons discussed subsequently herein, a granting of such a request automatically will disrupt the orderly process of the trial proceedings and thus Faretta mandates that such request for a continuance be denied.

Furthermore, the holding below unfairly places the burden on the People to show that the defendant made his

request for self-representation for the purpose of securing a delay of the trial proceedings. The Ninth Circuit clearly placed the burden on the People in that the Court concluded that the record does not even suggest "that Armant made this request for the purpose of delay." (Appendix A, p. 62.) Furthermore, the opinion below referred to Fritz v. Spalding (9th Cir. 1982) 682 F.2d 782, 784 which held that a demand for self-representation made on the eve of trial will be deemed timely unless it is shown that the demand was a tactic to secure a delay of the trial proceedings. This is a virtually impossible burden to place on the People. It is not possible to delve into the thought processes of the defendant. Thus it is impossible to show

if he is sincere in his desire to represent himself or is using the request for self-representation to delay the trial proceedings to his advantage. For instance, many a defendant is likely to seek delay of the trial proceedings: for as he prevails so, in corresponding measure will the prosecution case fade and diminish. Also, because of time constraints on the prosecution's busy calendar, might a plea bargain more likely be accomplished.

The holding below that places the burden on the People to show that the request for self-representation was not made for the purpose of delaying the trial proceedings is contrary to California law. California places the burden on the defendant to show that he did not make the

request for self-representation for the purpose of delaying the trial proceedings when that motion is made in conjunction with a request for a continuance. California places the burden on the defendant because "defendants should not be allowed to misuse the orderly administration of justice." (People v. Windham (1977) 19 Cal.3d 121, 128, fn. 5, 560 P.2d 1187.) Other states have followed California's rationale. (See Williams v. State (Wyo. 1982) 655 P.2d 273, 276; State v. Kender (1978) 21 Wash. 622, 587 P.2d 551, 553-554; State v. Fritz (1978) 21 Wash. App. 354, 585 P.2d 173, 178.) In fact, the court in State v. Barham (N.H. 1985) 495 A.2d 1269, 1275-1276, made it explicit that there is no right to a continuance

for the purpose of securing self-representation.

The decision below is even in conflict with the prior position of the Ninth Circuit itself. In an earlier case the Ninth Circuit held that the denial of a request for a continuance made on the eve of trial to secure self-representation rests in the sound discretion of the trial judge. (United States v. Portillo (9th Cir. 1980) 633 F.2d 1313, 1324-1325.) Yet here the Ninth Circuit declined to defer to the exercise of such sound discretion by the trial court.

The overwhelming weight of well-reasoned legal thinking, accordingly, concludes that a request for self-representation, made on the date set for trial, is not timely, especially where

the state defendant has not met his burden of justifying the delay in making the request. Yet the Ninth Circuit has chosen to eschew this Court's rulings and the sound analyses of most other courts. Accordingly, petitioner strongly urges this Court to grant certiorari to resolve the conflict between the decision below and all other opinions.

In an analogous area the various circuits have agreed with the reasons for petitioner's conclusion. The courts have ruled properly that the safe course in ruling on a request for a continuance on the eve of trial, for the purpose of securing other counsel, is to leave the matter to the discretion of the trial court, not the reviewing courts. (Birt v. Montgomery (11th Cir. 1984) 725 F.2d 587,

593; United States v. Todisco (2d Circ. 1981) 667 F.2d 255, 260; United States v. Coupez (9th Cir. 1979) 603 F.2d 1347, 1351; United States v. Oliver (D.C. Cir. 1978) 571 F.2d 664, 665; United States v. Harris (9th Cir. 1974) 501 F.2d 1, 4-5.) As United States v. Fountain (7th Cir. 1985) 768 F.2d 790, 794-795, observes, such last minute requests for a continuance can cause serious inconvenience to the judge, jury, opposing counsel and witnesses; thus a denial of the continuance should rarely be upset on appeal.

The reasoning of the foregoing cases disfavoring last minute requests for continuances is especially applicable in California where the California Legislature has specifically found "that

the criminal courts are becoming increasingly congested with resulting adverse consequences to the Welfare of the people and the defendant." (Cal. Pen. Code § 1050.) It is common knowledge that most states' Courts and Federal Courts are feeling the increasing burden of expanding case loads and lengthening pre-trial delays. It follows that if courts are mandated by the Armant decision, herein, to grant lengthy continuances on the eve of the trial, there will be but one result -- increased delay in bringing the accused to trial. Since memories of witnesses fade with time, the truth finding process will be accordingly compromised. Because congested calendars cannot easily be changed to satisfy last minute demands for continuances; -- Dismissal of cases at the

expense of the victims and society may unavoidably result. Nor should the convenience of witnesses be forgotten. It is difficult for witnesses to arrange their schedules to suit the needs of defendants attempting to delay the judicial process. The only conclusion must follow that where a defendant requests self-representation and a continuance on the eve of trial, it must be presumed that he has made such requests to disrupt the orderly judicial process absent a contrary showing by the defendant.

III

THE DETERMINATION OF WHETHER TO GRANT A CONTINUANCE FOR THE PURPOSE OF ALLOWING SELF-REPRESENTATION, WHEN MADE ON THE EVE OF TRIAL, SHOULD LIE WITHIN THE SOLE DISCRETION OF THE STATE COURTS

As already indicated, when respondent made his request for self-representation on the eve of trial, he requested a three week continuance. (Aug. R.T. p. 8.) Such request was unquestionably disruptive to the administration of justice for the reasons previously discussed. Nevertheless, the opinion below not only permits state defendants to wait until the very date the

trial is to commence to seek self-representation, but, also allows such defendant a lengthy continuance without any showing by the defendant that he was not attempting to delay the proceedings and that the continuance was necessary. Petitioner submits that for the reasons set forth above, to allow such continuances as a matter of right will disrupt orderly court proceedings and is contrary to the language of this Court in Faretta v. California, supra, 422 U.S. at 834, fn. 46.)

A request for a continuance for substitution of counsel is analogous to one for self-representation. In both instances the petitioner is purportedly attempting to secure a right. In the case of substitution of counsel, the defendant

is normally seeking effective representation which clearly is no less a constitutional right than is the right to self-representation. In both cases if the request is legitimate there can be a valid reason for a continuance. On the other hand, it is clear from the substitution of counsel cases that where there is no legitimate reason for the continuance, it need not be granted. It thus follows that a defendant seeking a continuance for self-representation must be required to show cause for the continuance and that in the absence of cause, there is not an abuse of discretion when the trial court denies the request. For instance in Ungar v. Sarafite (1964) 376 U.S. 575, 589, 591, this Court held that in the absence of a

showing of need for a continuance for substitution of counsel or to produce additional evidence, the reviewing court will not set aside the trial court's decision to deny the request.

Thus, since respondent made his request for a continuance on the eve of trial without meeting his burden, as set forth above, of showing a need for the continuance, it should be presumed that his request was made for the purpose of delaying the trial proceedings and that the trial court did not deny respondent his right to self-representation. In view of the fact respondent has not overcome that presumption, he is entitled to no relief. To hold that respondent was not unconstitutionally denied the right to self-representation is in conformity with

the majority of the decisions of the Circuit Courts of Appeals, which clearly place the burden on the defendant to justify a last minute request for a continuance.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME M. ARMANT, Petitioner-Appellant, v. JOE MARQUEZ, Respondent-Appellee.	No. 84-5672 USDC No. CV82-5403-FW O P I N I O N FILED SEPTEMBER 24, 1985 CLERK, U.S. COURT OF APPEALS

Argued and submitted: Nov. 7, 1984 --

Pasadena, California

Appeal from the United States District Court

for the Central District of California

Hon. Francis Whelan, District Judge,

Presiding

BEFORE: NELSON, BOOCHEVER AND REINHARDT, Circuit Judges. NELSON, Circuit Judge:

Jerome M. Armant, Jr., appeals from the district court's denial of his petition for writ of habeas corpus. In his petition, Armant alleges that his sixth amendment right to self-representation was violated by the California Superior Court. After an unequivocal, timely request to proceed pro se, Armant sought a continuance in order to prepare his defense. He maintains that the court's denial of his continuance was an abuse of discretion because it effectively prevented him from exercising his constitutional right of self-representation. We agree, and reverse and remand with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Armant was charged on February 11, 1981, with arson. The Los Angeles County District Attorney claimed that on January 4, 1981, Armant set fire to an automobile belonging to a woman alleged to be his estranged girl friend. On February 11, 1981, a Los Angeles County Public Defender was appointed to represent him. Armant was arraigned and entered a not guilty plea.

On February 18, 1981, in a brief hearing before the Hon. Edward A. Hinz, the following colloquoy took place:

> MR. CLARK [Armant's attorney]:
>
> First, your Honor,
>
> Mr. Armant indicated to me that he wanted to be appointed cocounsel in this case.

I informed Mr. Armant that the Public Defender's position is that we are not cocounsel for clients; that Mr. Armant wanted to represent himself.

He has a constitutional right to do that. But that the Public Defender would not be appointed in a cocounsel status in this case.

THE COURT: Well, the court so orders. Following this exchange, Judge Hinz set a trial date of March 30, 1981, and denied Armant's motions to be released on his own recognizance and to reduce bail.

In his next court appearance, March 30, 1981, Armant received permission to address the court. He complained of difficulties

with his attorney. He told Judge Hinz that he had asked his attorney to subpoena two witnesses, but that his attorney had failed to subpoena one of them. He said that he had asked for a copy of the transcript of his preliminary hearing, but that his attorney failed to provide it. After asking for a review of his motions to be released on his own recognizance, and to be appointed co-counsel, the following exchange ensued:

MR. CLARK: Mr. Armant's last request is he desires to go pro per at this time.

THE COURT: All right.

Would you hand Mr. Armant the appropriate form? We'll take this case up later.

Is that what you want to do, Mr. Armant?

You want to be your own lawyer?

THE DEFENDANT: Yes, I feel, Your Honor, if this man doesn't help me, you know --

After Armant had filled out the form and had given it to the clerk, Judge Hinz told Armant that he had a right to an attorney if he wished, and questioned him about his desire to give up that right. Armant unambiguously stated that he wanted to represent himself. Judge Hinz then asked him, "Are you prepared to go to trial in this matter today." Armant first said, "Yes, If I could," then immediately said, "no, I don't think so." Judge Hinz continued the following:

THE COURT: The question I want to know is, are you ready to go to trial today?

THE DEFENDANT: Not for myself.

THE COURT: Well, how --

THE DEFENDANT: I'm going to proceed -- I'm not ready to go to trial today.

THE COURT: How much time do you need to get ready?

THE DEFENDANT: Three weeks.

THE COURT: Well, the request of the defendant for a continuance to the day of trial [sic] to represent himself in pro per is denied.

It's not a timely-made request.

I'm not going to continue this matter for three weeks.

The court, after asking Armant's attorney if he was ready, then set the matter for trial.

At trial the next day before the Hon. John A. Shidler, Armant again received

permission to address the court. He asked for a continuance of 14 to 21 days to "hire an attorney of [his] own choosing." He complained again of conflicts with his attorney. Judge Shidler denied the motions and added, "We have to go on with this trial. If you do not wish to remain in the courtroom, you can probably sit in the jail, in the holding tank, if you want to." Armant responded that he would rather sit in the holding tank because he did not want to be in court with his appointed attorney.

After Armant left the courtroom, the trial commenced. The State called three witnesses. Armant declined his attorney's offer to testify in his own defense, and no other defense witnesses were called. At 2:35 p.m, the jury retired to deliberate. The

same afternoon they returned a verdict of guilty of arson, a violation of Cal. Penal Code section 451(d).

Armant's motion for a new trial was denied on June 8, 1981, by Judge Shidler. Armant's conviction was affirmed by the California Court of Appeal, Second District. His petition for hearing before the California Supreme Court was denied. His petition for writ of habeas corpus was denied without a hearing in the district court. Armant filed this timely appeal.

DISCUSSION

I. RIGHT TO PETITION FOR HABEAS RELIEF

Armant has now served his sentence, but his petition is not moot because the collateral consequences of his felony conviction persist. Javor v. United States,

724 F.2d 831, 835 (9th Cir. 1984) (citing Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977)). At the time his petition was filed, he was on parole for his offense. he was thus "in custody" as required by 28 U.S.C. § 2254(b). See Cervantes v. Walker, 589 F.2d 424, 425 n.1 (9th Cir. 1978).

II. THE RIGHT OF SELF-REPRESENTATION

The sixth amendment guarantees the right of a defendant to represent himself. Faretta v. California, 422 U.S. 806 (1975). A request for self-representation must be unequivocal, Meeks v. Craven, 482 F.2d 465, 466-68 (9th Cir. 1973), and timely, and must not be a tactic to secure delay. Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). If these criteria are met, then a defendant's motion to represent himself should be granted.

Here, Armant made an unequivocal request to represent himself on March 30 by filling out a form and unambiguously telling the court that he was aware of what he was doing. This request was made before the jury was empaneled. Accordingly, under the standard set forth in Fritz, 682 F.2d 784, it was timely as a matter of law unless it was a tactic to secure delay. See also Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U.S. 976 (1982).

In Fritz, the state appellate court, relying on evidence in the trial court record, found that the petitioner's motion to proceed pro se was "a tactic 'to delay his scheduled trial and obstruct the orderly course of the administration of justice.'" 682 F.2d at 784 (quoting State v. Fritz, 21 Wash. App. 354, 365, 585 P.2d 173, 180

(1978))). Fritz then petitioned for a writ of habeas corpus and moved for an evidentiary hearing on that issue. Id. The district court misapprehended the legal standard and evaluated whether granting the motion would have the effect of delay. Id. Concluding that it would, the district court denied the writ. We reversed and remanded with instructions for the district court to conduct an evidentiary hearing on the state appellate court's finding of purpose to delay. Id. at 786.

The case before us differs from Fritz in a most significant way. It is true that neither the district court here nor the district court in Fritz considered whether the self-representation motion was a tactic designed to delay trial. However, in this case the district court was correct in not

considering the petitioner's purpose because, in contrast to Fritz, the state appellate court did not find that the motion was a tactic to delay trial. In fact, nowhere in the record is there even a suggestion that Armant made this request for the purpose of delay; Armant was in jail at the time the motion was made and would apparently have remained there throughout the period of any continuance.[1/] Accordingly, there is no reason in this case, unlike Fritz, to remand for an evidentiary hearing on the purpose of the motion. On these facts it is clear that Armant made an adequate request which was timely as a matter of law and that he was, therefore, entitled to exercise his right of self-representation.

III. DENIAL OF CONTINUANCE

A. Introduction

We now turn to the crucial issue in this case, which is whether the court's denial of Armant's continuance motion under these circumstances was an abuse of discretion. See United States v. Daly, 716 F.2d 1499, 1511 (9th Cir. 1983), cert. dismissed, 104 S. Ct. 1456 (1984). An abuse of discretion will be found if "after carefully evaluating all relevant factors, we conclude that the denial was arbitrary or unreasonable." United States v. Flynt, 756 F.2d 1352, 1358 (9th Cir. 1985). This is a case-by-case inquiry; we are bound by no particular mechanical test. Id. at 1362 (citing Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

In Flynt, we set forth four factors that appellate courts have considered when faced

with this issue. First, we look to the degree of diligence by the appellant prior to the date beyond which a continuance is sought. Id. at 1359-60. Second, we consider whether the continuance would have served a useful purpose if granted. Id. at 1360. Third, we weigh the inconvenience that granting the continuance would have caused the court or the government. Id. at 1360-61. Fourth, we look to the amount of prejudice suffered by the appellant. Id. at 1361. These factors must be considered together, and the weight given to any one may vary from case to case. Id. at 1359. At a minimum, however, in order to succeed the appellant must show some prejudice resulting from the court's denial. Id.

B. Diligence

Armant first expressed dissatisfaction with his attorney on February 18, which was his second court appearance. At that time, Armant framed his desire as one to become co-counsel; his own counsel apparently told him that his best option in order to fulfill his desire was to request self-representation. The next time he was in court, March 30, Armant made an unequivocal request for self-representation and requested a continuance when asked if he was ready to proceed at that time. He had, earlier in the same hearing, informed the court of his desire to prepare his own defense. On March 31, his next time in court, he sought a continuance to find a new attorney who would prepare his case as he wanted, apparently believing that the court had the previous day

denied his request for self-representation.[2/] We believe that under the circumstances, Armant, who is not an attorney trained in the law, exercised adequate diligence in asserting his right to self-representation. We also believe that he could not be expected to exercise any more diligence than he did to prepare his own defense when he was in jail from February 11, 1981, through the date of his trial, and was not granted the right of self-representation until the day before trial.

C. Usefulness of the Continuance

Armant sought a continuance in order to represent himself effectively: he wanted time to prepare his defense. Because the continuance was denied, the trial proceeded with a public defender, with whom Armant was dissatisfied, acting in Armant's behalf. On

these facts, we conclude that the continuance, if granted, would have served a useful purpose. In fact, if granted, the continuance would have allowed for the exercise of a right guaranteed by the United States Constitution. See part III.E., Infra.

D. Inconvenience

Armant's trial lasted only one day from start to finish. Recalendaring here, as in Flynt, would not have created grave scheduling difficulties. The government called only three witnesses, all of whom appear to have been residents of the area in which the trial was held. In sum, the court and the prosecution would have suffered minimal inconvenience here had a continuance been granted. See Flynt, 756 F.2d at 1360-61, and cases cited therein.

E. Prejudice to Appellant

Finally, we must look to the prejudice suffered by appellant because of the denial of the continuance. As we have stressed, Armant's request for a continuance was in essence a request to meaningfully assert the right to self-representation. Armant's need for a continuance was both reasonable and apparent. When asked whether he was ready to go to trial on March 30, having been granted pro se status only moments before, he said, "not for myself." Before denying the continuance on March 30, Judge Hinz knew that Armant wanted to make motions his attorney had not made, wanted to call witnesses his attorney had not called, and wanted to review his preliminary transcript. In short, Armant had stated that he wanted to prepare for trial, and the court's denial of a

continuance prevented him from so doing. The prejudice suffered by Armant here was no less than the effective denial of his Constitutional right to self-representation. Cf. Powell v. Alabama, 287 U.S. 45, 59 (1932) ("It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.") (quoting Commonwealth v. O'Keefe, 298 Pa. 169, 173 (1929)).

CONCLUSION

Armant made an unequivocal, timely request to represent himself, and there was no suggestion of a purpose to delay. To deny him a continuance which would have allowed him to prepare for trial effectively rendered his right to self-representation meaningless.

All four factors discussed in Flynt weigh in Armant's favor. On the facts of this case, it was therefore an abuse of discretion to deny him a continuance to allow him to prepare his own defense.

This error mandates reversal of Armant's conviction if there is a reasonable possibility that the error materially affected the verdict. Hinman v. McCarthy, 676 F.2d 343, 349-50 (9th Cir.), cert. denied, 459 U.S. 1048 (1982). Here, the evidence against Armant was not "overwhelming," and was 'woven from circumstantial evidence." Harrington v. California, 395 U.S. 250, 254 (1969), quoted in Hinman, 676 F.2d at 350. The improper denial of Armant's continuance request denied him the opportunity to prepare his own defense to a felony charge. Under the

circumstances we conclude that there is indeed a reasonable possibility that the error materially affected the verdict.

The district court's denial of the writ of habeas corpus is reversed. We remand to the district court for issuance of the appropriate writ reversing Armant's conviction and allowing the State to retry him if it so chooses. See Hinman, 676 F.2d at 345.

REVERSED AND REMANDED.

FOOTNOTES

1/ The effect of granting Armant's March 30 motion would have been to delay the trial. However, this effect must be attributed not to Armant's purpose but to the court's failure to grant Armant's request when it was first made on February 18, six weeks before trial. Each time Armant appeared before the court he expressed his dissatisfaction with his court-appointed attorney. Whether by motion to be appointed co-counsel or by motion for self-representation, Armant consistently sought an order from the court that would have allowed him to subpoena the witnesses his counsel refused to call. Had Armant's request for a change in the form of representation been granted when first made, no cintinuance would have been necessary.

The fact that the court was unresponsive to Armant's February 18 request cannot be used to suggest that Armant's purpose in making similar requests on March 30 and 31 was to delay trial. It is clear that Armant's purpose throughout --whether his motion at any particular time was phrased as one to be appointed co-counsel or to proceed without counsel -- was to be afforded an opportunity to conduct his defense as he thought best.

2/ In his habeas petition Armant states that at his March 30 hearing, "the judge said my motion for self-representation was not made timely and that I could not represent myself."

BOOCHEVER, J., dissenting in part:

I agree with the majority in reversing the denial of Armant's petition. I write separately, however, because the majority disregards Ninth Circuit precedent as to the proper procedure on remand in this case. Moreover, I disagree with the majority's analysis of the "pro se request" and "request for continuance" as two distinct and unrelated issues. On the facts of this case, we cannot ignore that the two requests were related.

Armant's only arguably unequivocal pro se request was made on the date that trial was originally scheduled and was conditioned on securing a three week continuance. Ninth Circuit precedent establishes that "a motion to proceed pro se is timely made if before the jury is empaneled, unless it is shown to

be a tactic to secure delay." Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). Fritz explains in detail the proper analysis of the timeliness of pro se requests that result in delay:

> Delay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation. Any motion to proceed pro se that is made on the moring of trial is likely to cause delay; a defendant may nonetheless have bona fide reasons for not asserting his right until that time, and he may not be deprived of that right absent an affirmative showing of purpose to secure delay.
>
> In determining whether a defendant's request to defend

himself is a tactic to secure delay, the court may, of course, consider the effect of delay. A showing that a continuance would be required and that the resulting delay would prejudice the prosecution may be evidence of a defendant's dilitory intent. In this case, for example, where Fritz's pre-trial conduct had already caused substantial delay, a showing that his motion included a request for a continuance would be strong evidence of a purpose to delay. The inquiry, however, does not stop there. The court must also examine the events preceding the motion, to determine whether they are consistent with a good faith assertion of the Faretta right and

> whether the defendant could reasonably be expected to have made the motion at an earlier time.

Id. at 784-85 (citation omitted).

In Fritz, the district court denied Fritz's petition for habeas corpus without a hearing on two grounds: first, because it found that his pro se motion in the state court had been untimely, and second, because it found that the state court record amply supported a finding of untimeliness. We reversed, finding that both the district courts, id. at 785-86, had applied an incorrect rule of law as to timeliness. Because they misconceived the legal standard, neither court had made the proper inquiry into whether Fritz' motion was a delaying tactic. Thus the record was not adequately developed on that crucial factual issue. We

held that the correct procedure in such a case was to remand to the district court for an evidentiary hearing "to determine whether his motion to proceed pro se was made as a tactic to delay the start of trial." Id. at 786.

In this case, as in Fritz, Armant made his pro se motion and continuance request immediately before trial was scheduled to start. I find it impossible to tell from the transcript whether the court's denial of that request (or requests) was a grant to proceed pro se but denial of a continuance, or a denial of the pro se request because it was conditioned upon a three week delay. What is crystal clear is that the court did not want to delay the trial:

THE COURT:

> Well, the request of the defendant for a continuance of the day of trial to represent himself in pro per is denied. It's not a timely-made request. I'm not going to continue this matter for three weeks.

If the judge's ruling was a denial of the pro se request because it was conditioned upon delay, then the court (and the state appellate courts) should have inquired into whether the motion was made as a delay tactic, or merely had a delay effect. Neither court did so, and thus on this question "the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3) (1982). Armant is therefore entitled, under Fritz, to

an evidentiary hearing in the district court on this question. If the district court, applying the principles set forth in Fritz, finds that the pro se motion was not a delay tactic, it should then issue an appropriate writ for the reasons well set forth in the majority opinion. Because there has been no record yet developed as to delay purposes, however, I conclude that we are bound by Fritz to remand to the district court for hearing rather than ordering the district court to issue the writ forthwith.

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME M. ARMANT, Petitioner-Appellant, v. JOE MARQUEZ, Respondent-Appellee.	No. 84-5672 DC. No. CV 82-5403 FW ORDER FILED NOVEMBER 19, 1985 CLERK, U.S. COURT OF APPEALS

Before: NELSON, BOOCHEVER and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the

suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEROME MALCOLM ARMANT, JR., Petitioner, v. JOSEPH MARQUEZ, Superintendent, Respondent.	No. CV 82-5403-FW(JR) JUDGMENT FILED MAY 20, 1983 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

IT IS ADJUDGED that the action and petition are dismissed.

DATED: May 20, 1983.

FRANCIS C. WHELAN
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEROME MALCOLM ARMANT, JR., Petitioner, v. JOSEPH MARQUEZ, Superintendent, Respondent.	No. CV 82-5403-FW(JR) JUDGMENT FILED MAY 20, 1983 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA PROPOSED ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, and the attached Report and Recommendation of the Magistrate and the objections, and approves and adopts the

Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that judgment be entered dismissing the petition for writ of habeas corpus.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and the Judgment by United States mail on the petitioner and Attorney General of the State of California, and the Presiding Judge, Superior Court.

DATED: May 20, 1983.

_____

FRANCIS C. WHELAN
United States District Judge

FILED

APR 21 1983

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

ENTERED

MAY 25 1983

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEROME MALCOLM ARMANT, JR. Petitioner, v. JOSEPH MARQUEZ, Superintendent, Respondent.	CV No. 82-5403-FW(JR) FINAL REPORT AND RECOMMENDATION

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable

Francis C. Whelan, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On April 8, 1983, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate's Report and Recommendation.

On April 18, 1983, the petitioner filed his objections to the Magistrate's report and recommendation.

CONCLUSION

Having fully considered petitioner's objections, the Magistrate reaffirms the findings and conclusions as set forth in the Report and Recommendation.

RECOMMENDATION

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and (2) directing that judgment be entered dismissing the petition.

JOSEPH REICHMANN
United States Magistrate

DATED: April 21, 1983

April 8, 1983

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEROME MALCOLM ARMANT, JR., Petitioner, v. JOSEPH MARQUEZ, Superintendent, Respondent.	NO. CV 82-5403-FW(JR) JUDGMENT

IT IS ADJUDGED that the action and petition are dismissed.

DATED:

FRANCIS C. WHELAN
United States District Judge

FILED

APR 8 1983

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEROME MALCOLM ARMANT, JR., Petitioner, v. JOSEPH MARQUEZ, Superintendent, Respondent.	NO. CV 82-5403-FW(JR) REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted to the Honorable Francis C. Whelan, United States District Judge, pursuant to the provisions of 28 U.S.C.§636 and General Order 194 of the United States District Court for the Central District of

California.

FACTS

On February 18, 1981, petitioner, through his attorney, requested the Superior Court in Los Angeles appoint him as co-counsel to defend against a charge of arson (Augmented R.T. 1). The motion was denied.

On March 30, 1981, the date that trial of the matter was to commence, petitioner expressed dissatisfaction with representation of his appointed counsel and moved the court at various times during the hearing (1) to appoint new counsel, (2) to appoint petitioner as cocounsel, and finally (3) to represent himself (Augumented R.T. 3-9). Petitioner requested a three-week continuance of the trial date in order to prepare his own defense. The motion was denied as untimely.

On March 31, 1981, after voir dire of the prospective jury, petitioner moved the court to continue the trial 14 to 21 days so that he could hire his own attorney (R.T. 1-7). After conducting an inquiry into the alleged conflict between petitioner and his attorney, the court declined to allow the continuance (R.T. 5-8). Petitioner then voluntarily returned to the holding tank where he remained for the duration of the trial.

Petitioner was thereafter convicted of arson. When this present petition was filed, petitioner had already been paroled (Petn. §10.e).

Petitioner challenges his conviction on the following grounds:

1. The court misconstrued the February 18, 1981 motion as a motion for appointment as co-counsel;

2. The court failed to inquire into petitioner's reasons for the motion of February 18, 1981;

3. He was denied the right to represent himself;

4. He was denied the right to a continuance of the trial date to prepare his own defense; and

5. He was denied effective assistance of counsel because of alleged conflict with appointed counsel.

BACKGROUND

1. Petitioner's contention that the February 18, 1981 motion was in fact a motion to proceed pro se, and not a motion for appointment as co-counsel, is unsupported by the record (Augmented R.T. 1). In addition, petitioner was present at the hearing, but failed to apprise the court of the alleged

true nature of the motion. Moreover, petitioner's contention is rendered less credible by the fact that, at the next available opportunity to clarify the motion, on March 30, 1981, he did not request to proceed pro se until after he had first requested new counsel and reiterated his motion to be appointed co-counsel (Augmented R.T. 5-6).

2. Petitioner suggests that, upon learning of his desire to be appointed co-counsel, the court was under a duty to determine his reasons and whether or not he was actually exercising his right to proceed pro se (Petn. §10.5). No such determination is constitutionally mandated. Although it is true that a court has a duty to inquire where it becomes apparent from repeated motions for appointment of new counsel brought early in

the proceedings that the defendant and his attorney are embroiled in "irreconcilable conflict," Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970), no such duty arises upon a single motion to be appointed counsel.

3. Petitioner was not denied the right to represent himself. On the contrary, the court acknowledged that right by stating, "if you want to go pro per, you've got a right to do it . . ." The court merely denied petitioner's untimely request for a three-week continuance of the trial date to prepare his own defense (Augmented R.T. 7-9).

Moreover, it is not clear that petitioner's ultimate desire was to proceed pro se. Where it cannot be concluded that a defendant's demand to proceed pro se was unequivocal, no denial of the right to

self-representation has occurred. Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973). Petitioner variously requested to be appointed co-counsel (on two occasions), to represent himself, to have new counsel appointed, and finally, to have his own retained counsel (which he now admits was not financially feasible [Mtn. for New Trial 1]). Thus, his equivocal demands did not entitle him to proceed pro se.

4. It is axiomatic that the granting of a continuance lies within the sound discretion of the trial judge. United States v. Michelson, 559 F.2d 567, 572 (9th Cir. 1977). The court does not abuse its discretion by denying a continuance to allow defendant to prepare his own defense where, as here, the motion was brought on the day trial was to begin, defendant failed to avail himself of

earlier opportunities to apprise the court of an alleged conflict with counsel, the court conducted an adequate hearing into defendant's complaint (see infra) and the conflict did not result in a total lack of communication preventing a defense (see infra). See United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979).

5. On March 31, 1981, the trial court determined, after a hearing on the merits at which petitioner was present, that there was insufficient conflict between petitioner and his attorney to support a continuance to obtain other counsel (R.T. 5-7). That determination is entitled to a presumption of correctness if it is supported by the record. Sumner v. Mata, 449 U.S. 539, 550-552 (1981).

The record reflects that petitioner's dissatisfaction arose out of counsel's alleged failure to subpoena petitioner's two sisters and his employer and failure to provide petitioner with a transcript of pretrial proceedings. The record further reflects that petitioner's appointed counsel interviewed the witnesses in question and determined that their testimony would be detrimental, subpoenaed petitioner's father at petitioner's request and likewise determined that his testimony would be detrimental, that counsel was thoroughly familiar with the case and prepared to go to trial, and that, in the opinion of petitioner's attorney, there was insufficient conflict to support a continuance. Accordingly, the trial court's determination is supported by the record, and it cannot be

said that the alleged conflict resulted in deficient representation.

CONCLUSION

For the reasons stated above, petitioner is not entitled to a writ of habeas corpus.

IT IS THEREFORE RECOMMENDED that this Court issue an Order dismissing the petition and action.

DATED: April 8, 1983.

JOSEPH REICHMANN
United States Magistrate

APPENDIX D

2 CRIM. NO. 40469
(Super. Ct. No. A197961)

COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEROME MALCOLM ARMANT, JR.,

Defendant and Appellant.

OPINION

COURT OF APPEAL SECOND DIST.

F I L E D

May 27, 1982

CLAY ROBBINS, JR. Clerk

Deputy Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	2D CRIM. NO. 40469 (Super Ct.No. A-197961
Plaintiff and Respondent,	
v.	
JEROME MALCOLM ARMANT, JR.,	
Defendant and Appellant.	

Jerome Armant appelas from the judgment entered following a jury trial in which he was found guilty of arson (Pen. Code, § 451, subd. (d)). He was sentenced to state prison for the middle term of two years. He contends: (1) He was denied his "right of self-representation" by reason of the trial court's failure to inquire, at his trial setting, whether he wished to represent himself. (2) The court erred in denying as untimely his subsequent motion to proceed in propria persona. (3) The court erred in denying him a short continuance to prepare his own defense.

The evidence established that after being advised of and waiving his constitutional rights (Miranda v. Arizona (1966) 384 U.S. 436), appellant admitted that in the early morning hours of January 4, 1981, he set fire

to an automobile which belonged to his ex-girlfriend's mother.

The record establishes that on February 11, 1981, the public defender was appointed to represent appellant. On February 18 1981, the date set for the pretrial conference, the following occurred:

> "MR. CLARK [deputy public defender]: . . . First, Your Honor, Mr. Armant indicated to me that he wanted to be appointed cocounsel in this case.
>
> "I informed Mr. Armant that the Public Defender's position is that we are not cocounsel for clients; that Mr. Armant wanted to represent himself.
>
> "He has a constitutional right to do that. But that the Public Defender would not be appointed in a cocounsel status in this case.

"THE COURT: Well, the court so orders."

Appellant's counsel then moved that appellant be released on his own recognizance, which motion was denied.

On March 30, 1981, at his next court appearance, appellant's renewed motions to be released on his own recognizance and to be appointed cocounsel were again denied. His subsequent motion for a three-week continuance to proceed in propria persona was denied for lack of timeliness. When the trial court questioned appellant as to the reasons for his dissatisfaction with his appointed attorney, appellant stated generally that his attorney was not helping him. He also stated that the attorney felt there was no need for Penal Code sections

1538.5 and 995 motions,[1] he wanted to have his motion for release on his own recognizance renewed, and he and his attorney had a disagreement about what witnesses should be subpoenaed to testify at trial.

Trial was trailed to the next day, March 31, 1981. At that time appellant again indicated his displeasure with his court-appointed attorney. In response to questions by the court, appellant stated that his attorney had lied to him about subpoenaing his two sisters and employer to testify and that, until this day, he had not seen a transcript of his preliminary hearing although he had requested to see it. When

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1. The court's minutes indicate that a Penal Code section 995 motion was made on that date and denied.

questioned, appellant's attorney informed the court that he had interviewed the witnesses desired by appellant, and found that they would not only not be helpful but could actually damage appellant's case. The attorney stated that he never told appellant he would subpoena his employer. His attorney further stated that he was thoroughly familiar with the case and prepared for trial.

Appellant's first two contentions are without merit. On February 18, 1981, at appellant's trial setting conference, his attorney informed the court of appellant's request to be appointed cocounsel. On that date appellant did not request that his attorney be discharged and the court at that point was not under a duty to make an inquiry

pursuant to People v. Marsden (1970) 2 Cal.3d 118. When appellant on both March 30, 1981 and March 31, 1981 actually asked to proceed in propria persona, he was given ample opportunity to explain his reasons for dissatisfaction with counsel, none of which required the dismissal of his appointed attorney.[2/]

---

2. Appellant's disagreement with his attorney over which witnesses to call was a tactical matter which does not require substitution of counsel (People v. Williams (1970) 2 Cal.3d 894) unless it signals a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to the effective assistance of counsel. Here, although appellant subsequently refused to cooperate or appear

Appellant's next contention is also meritless. The trial court did not err in denying his request for a three-week continuance. An appellant who wishes to represent himself must make an unequivocal assertion of that right within a "reasonable time" prior to the commencement of trial. (People v. Windham (1977) 19 Cal.3d 121, 128.) The trial court did not abuse its discretion in denying appellant's request

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in the courtroom, the breakdown in the attorney-client relationship was due to his own intransigence and failure to cooperate. (People v. Floyd (1970) 1 Cal.3d 694, 704-705; People v. Kaiser (1980) 113 Cal.App.3d 754, 761; People v. Lindsey (1978) 84 Cal.App.3d 851.)

made on the day set for trial. (Id. at p. 128, fn. 5.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

DANIELSON, J.

We concur:

KLEIN, P.J.

LUI, J.

APPENDIX E

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, Crim. No. 40469

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JUL 22 1982
LAURENCE P. GILL, CLERK

_____
Deputy

PEOPLE

v.

JEROME MALCOM ARMANT, JR.

Appellant's petition for hearing

DENIED.

_____
BIRD
Chief Justice